Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01-455

IN THE
Supreme Court of the United States

FRANCONIA ASSOCIATES, *ET AL.*,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF BANK OF AMERICA, FSB, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Steven S. Rosenthal
Counsel of Record
Alan K. Palmer
Leo G. Rydzewski
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 955-3000
Counsel for Bank of America, FSB

John C. Millian
GIBSON, DUNN
& CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
Counsel for Gerald R. Parsky

Melvin C. Garbow
Howard N. Cayne
David B. Bergman
Michael A. Johnson
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Counsel for Beverly W. Thrall (Successor By Operation of Law to the Claims of Larry B. Thrall)

Daniel J. Goldberg, Esq.
KUTAK ROCK LLP
1101 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
Counsel for LSB Industries and Prime Financial Corp.; James M. Weichert; Morton Federal Savings Bank; Heartland Savings Bank, FSB and Love Savings Holding Co.; First Federal Bank and Southeastern Financial, Inc.; Hometown Savings and Loan; and Clare Bank, N.A. and E. Robert Clare.

William T. Reilly
McCARTER &
ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
Counsel for Statewide Savings Bank, S.L.A.

Stephen M. Forte
SMITH, GAMBRELL
& RUSSELL, LLP
1230 Peachtree Street
Suite 3100
Atlanta, GA 30309
Counsel for SouthTrust of Georgia, Inc. and SouthTrust Bank of Georgia, N.A.

Michael C. Leuder
777 E. Wisconsin Ave.
Milwaukee, WI 53202
Counsel for Mercantile Bank of St. Louis, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Whether The Limitations Period Commenced On The Date Of ELIHPA's Enactment Rather Than On The Effective Date Of Its Implementing Regulations Is Not Before The Court..... 4

II. Whether The Limitations Period Commenced With ELIHPA's Enactment Or On The Effective Date Of Its Implementing Regulations Turns On The Facts Concerning ELIHPA And Does Not Necessarily Govern Other Statutory Regimes 7

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Air Courier Conference v. American Postal Workers Union, 498 U.S. 517 (1991) 6-7

Alder Terrace v. United States, 161 F.3d 1372 (Fed. Cir. 1988)..... 13

Ariadne Financial Servs. Pty. Ltd. v. United States, 133 F.3d 874 (Fed. Cir. 1998)..... 2, 8

Bank of America, F.S.B. v. United States, 51 Fed. Cl. 500 (2002) 12

El Paso Savings Ass'n v. Director, OTS, No. EP-89 CA 426 (W.D. Tex. Nov. 24, 1989).... 12

Franconia Assocs. v. United States, 43 Fed. Cl. 702, *reh'g denied*, 44 Fed. Cl. 315 (1999) 5-6

Franconia Assocs. v. United States, 240 F.3d 1358 (Fed. Cir. 2001)..... 4-5, 6, 13

Franconia Assocs. v. United States, No. 01-455 (U.S. Sept. 10, 2001)..... 2-3

Franconia Assocs. v. United States, No. 01-455 (U.S. Nov. 16, 2001)..... 6

Franconia Assocs. v. United States, No. 01-455, 2002 WL 10619 (U.S. Jan. 4, 2002)..... 13-14

Long Island Savings Bank, F.S.B. v. FSLIC, No. CV-89-2699 (E.D.N.Y. Oct. 20, 1989)..... 12

Plaintiffs in Winstar-Related Cases v. United States, 37 Fed. Cl. 174 (1997) 1, 9, 10-12

Shane v. United States, 161 F.3d 723 (Fed. Cir. 1998)..... 2

United States v. Winstar Corp., 518 U.S. 839 (1996)..... 1, 8

STATUTES

Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877..... 2

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183..... 1

§ 401(h), 103 Stat. 357..... 8-9

Tucker Act, 28 U.S.C. § 2501 (2001) 1

42 U.S.C. § 1472(c)(5)(J) (2001)..... 13

LEGISLATIVE MATERIALS

7 C.F.R. § 1965.98 (1989) 5

Regulatory Capital, 54 Fed. Reg. 46,845 (Nov. 8, 1989) 9

H.R. Conf. Rep. No. 101-222 (1989),
reprinted in 1989 U.S.C.C.A.N. 432, 445 9

OTHER SOURCES

Memorandum from OTS to Thrift Managing
Officers (Dec. 1989)..... 9

Memorandum from OTS to Thrift Managing
Officers (Sept. 1989)..... 9

OTS, *Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund*, Thrift Bulletin No. 38-2 (Jan. 9, 1990), *available at* 1990 WL 309397..... 10

INTEREST OF *AMICI CURIAE*

Amici Curiae are plaintiffs in eleven so-called "*Winstar*-related" cases pending in the U.S. Court of Federal Claims.[1] Those cases, which raise issues of the sort adjudicated by this Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), all involve statute of limitations questions under the Tucker Act, 28 U.S.C. § 2501 (2001), as does this case. All of the *amici* have alleged in their complaints that by virtue of the promulgation of regulations or other actions taken by the government under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C.) ("FIRREA"), the United States breached its contractual obligations to the plaintiff or plaintiffs in question.

In *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174 (1997) ("the FIRREA Limitations Decision"), the Court of Federal Claims rejected the government's argument that the limitations period applicable to *amici* was triggered on August 9, 1989, the date on which FIRREA was enacted into law. Instead, the court held that the limitations period commenced at the earliest on December 7, 1989, the day on which the relevant implementing regulations promulgated under FIRREA took effect. *Id.* at 184, 191. That holding has not yet been subject to appellate review, since the *amici's* cases are still proceeding at the trial level, with no final judgment having

[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

yet been entered.[2] *Amici* seek to make this Court aware of certain important aspects of this case that distinguish it from the *Winstar*-related cases, so that the Court can craft its decision without inadvertently addressing issues not presented here -- issues that are, by contrast, presented in the very different context of the *Winstar*-related cases. At a minimum, *amici* believe it will be helpful for the Court to have in mind the distinctions between this case and the pending *Winstar*-related cases.

For many of the reasons stated in the petition for *certiorari* in this case, *amici* believe that the decision below should be reversed. In particular, it is inconsistent with law, logic, fairness, and judicial efficiency to hold -- as did the Federal Circuit -- that a potential plaintiff who might not know for at least a decade or two whether it has in fact been injured by ELIHPA[3] (because it will not know until then whether it wishes to prepay its loan) nonetheless was required to file suit within six years of the enactment of that statute.[4] *See* Consolidated Petition for Writ of Certiorari at 4, 12-13, *Franconia Assocs. v. United States*, No. 01-455 (U.S. Sept. 10, 2001).

Amici's most critical interest, however, is in ensuring that if the decision of the Federal Circuit is affirmed, the Court will base its decision on the facts of this ELIHPA-related case and will not address facts and statutory regimes -- such as the statutory regime created by FIRREA -- that are not involved here and that may well be governed by principles other than those which the Court applies here. At the core of *amici's* concern is the fact that both the Court of Federal Claims and the Federal Circuit discussed (albeit briefly) an issue that is not actually presented by this case but that *is* presented, in the context of FIRREA, by the *Winstar*-related cases filed by *amici*. That issue, stated in the abstract, is whether the Tucker Act's six-year limitations period began to run at the time the statute in question was enacted or only when the regulations promulgated under the statute took effect. *Amici* hope to assist the Court by clarifying that issue in the contrasting contexts of this case and the *Winstar*-related cases.

SUMMARY OF ARGUMENT

This case does not present the question of whether Petitioners' claims accrued for limitations purposes on the date of ELIHPA's enactment as opposed to the effective date of ELIHPA's implementing regulations. Since the Petitioners' claims would be barred by the Tucker Act's six-year limitations period if their claims accrued on either of

---

[2] In *Shane v. United States*, 161 F.3d 723 (Fed. Cir. 1998), and *Ariadne Financial Services Pty. Ltd. v. United States*, 133 F.3d 874 (Fed. Cir. 1998), the Federal Circuit held that two *Winstar*-related cases in which the complaints had been filed in February and April 1995, well after six years following the effective date of the regulations implementing FIRREA, were barred by the Tucker Act's six-year statute of limitations. However, that court specifically declined to address in its opinions in those cases whether the statute began to run with the enactment of FIRREA or on the date of its implementing regulations (or, indeed, on another date prior to February 1990, *see* note 6 below), since the complaints in those cases were untimely in any event. *Shane*, 161 F.3d at 727; *Ariadne*, 133 F.3d at 880.

[3] Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877, codified as amended in relevant part at 42 U.S.C. § 1472(c) (1988) ("ELIHPA").

[4] *Amici* will assume herein knowledge of the ELIHPA statutory scheme and the facts of this case to the extent that they were presented in the Consolidated Petition for Writ of *Certiorari* and the Brief for the United States in Opposition to the Petition.

those dates, as contrasted with the later accrual dates suggested by Petitioners, an affirmance of the decision below need not and should not address the statutory-enactment/date-of-regulations issue.

In any event, any affirmance should be based on the facts and circumstances surrounding the statutory and regulatory scheme created by ELIHPA. That scheme differs from others, including the regime created by FIRREA. As the Court of Federal Claims has already held (pending appeal) in its FIRREA Limitations Decision, the relevant provisions of FIRREA did not become effective until the regulations promulgated thereunder took effect. That is not so in this case, where the pertinent aspects of ELIHPA became effective immediately. Should the Court affirm the decision under review and discuss the enactment date/date of regulations issue, therefore, *amici* respectfully ask that the Court make clear that its discussion does not govern different statutory/regulatory regimes, such as FIRREA's.

ARGUMENT

I. Whether The Limitations Period Commenced On The Date Of ELIHPA's Enactment Rather Than On The Effective Date Of Its Implementing Regulations Is Not Before The Court

The facts of this case will of course be explained in detail by the Petitioners and the Respondent. For *amici's* purposes, however, the key facts may be quickly summarized.

The enactment of ELIHPA, on February 5, 1988, itself limited, without further action by Government authorities, the ability of the Farmers Home Administration

of the Department of Agriculture (the "FmHA")[5] to accept prepayment of loans which the FmHA had made to the Petitioners. *Franconia Assocs. v. United States*, 240 F.3d 1358, 1364 n.3 (Fed. Cir. 2001). The regulations implementing ELIHPA, which elaborated on that already-effective limitation, took effect on May 23, 1988. *See* 7 C.F.R. § 1965.98 (1989). The relevant question addressed by the lower courts herein was whether the Petitioners' complaints for breach of contract, filed in 1997, were timely under the Tucker Act's six-year limitations period. The Petitioners argued (and continue to argue) that the limitations period did not and would not commence for a given plaintiff until the point in time -- which might be decades after 1988 -- at which that plaintiff sought to prepay a loan and was prevented from doing so by ELIHPA and/or its implementing regulations. Thus, the issue of whether the limitations period was triggered by enactment of the statute as opposed to implementation of the regulations promulgated under it is not presented by this case, since the Petitioners' complaints are barred by the statute of limitations unless their theory as summarized above is accepted (as we believe it should be) -- *i.e.*, the complaints are either timely or untimely regardless of what the answer to the date-of-enactment/date-of-regulations question might be.

The opinion of each of the lower courts, however, purported to address that question. The Court of Federal Claims ventured the view that the breach triggering the limitations period "occurred on May 23, 1988, when the FmHA's regulations, issued pursuant to the enabling

---

[5] As the Federal Circuit noted in *Franconia*, 240 F.3d at 1359 n.1, "[t]he agency formerly known as the Farmers Home Administration has undergone several name changes, and is now known as the Rural Housing Service." As did the Federal Circuit, we will refer to all such agencies jointly as the "FmHA."

legislation, became effective." *Franconia Assocs. v. United States*, 43 Fed. Cl. 702, 709, *reh'g denied*, 44 Fed. Cl. 315 (1999). The Federal Circuit's opinion, however, asserted that "any breach would have occurred earlier, with the enactment of ELIHPA on February 5, 1988." *Franconia*, 240 F.3d at 1364 n.3.

Both of these assertions are mere *dicta*, however, since the statute-versus-regulations issue simply was not -- and is not -- presented by this case, as we have explained. Stated differently, the conclusion that each court reached, holding that the Petitioners' complaints were untimely, in no way rests on whether the limitations period began to run with ELIHPA's enactment or when its implementing regulations became effective. The Government specifically acknowledged this point in its Brief in Opposition to the Petition for Writ of *Certiorari* herein:

> The court of appeals held that the district court had erred in holding that the cause of action accrued on the date the regulations took effect (May 23, 1988), rather than the date ELIHPA was enacted (Feb. 5, 1988) . . . . *Nothing in this case turns on that distinction, however, since petitioners took far more than six years to file their claims, regardless of which date is used.*

Brief for the United States in Opposition at 7 n.1, *Franconia Assocs. v. United States*, No. 01-455 (U.S. Nov. 16, 2001) (emphasis added).

Thus, we respectfully suggest that the question of whether the statute of limitations began to run when ELIHPA was enacted or when the FmHA's regulations became effective need not and should not be addressed by the Court. Neither party has an interest in briefing the issue, since nothing in the case turns on it. *See, e.g., Air Courier*

Conference v. American Postal Workers Union, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) (case should be decided on "best and narrowest ground available").

II. Whether The Limitations Period Commenced With ELIHPA's Enactment Or On The Effective Date Of Its Implementing Regulations Turns On The Facts Concerning ELIHPA And Resolution Of That Issue Would Not Necessarily Govern Comparable Questions Under Other Statutory Regimes

If the Court's opinion herein affirms the decision below and does discuss whether the limitations period in this case commenced with the statutory enactment or on the effective date of the relevant regulations, sound jurisprudential principles counsel that any such discussion be limited to the context of ELIHPA and the regulations implementing it, and not extend to other statutes and implementing regulations. Limiting any affirmance of the decision below in this fashion is especially important given the fact that, although under some statutory regimes the Tucker Act limitations period may start to run with the statute's enactment, under others it clearly does not. Each situation must be addressed on the basis of its own facts.

It may well be that in some circumstances enactment of a statute which itself directly and immediately abrogates or limits a party's rights under a contract with the United States and thereby immediately injures that party will trigger the Tucker Act's six-year limitations period. It is clear, however, that in some instances the limitations period associated with a statute affecting contract rights will start to run only at a later point in time. The most obvious such case is one in which a statute enacted on July 1 states that it shall not take effect until October 1. Clearly enactment of such a

statute is a mere anticipatory repudiation of any contract rights that its provisions might abrogate, and neither a breach nor any resulting harm would occur until October 1 at the earliest. One clear reason for this conclusion is that such a statute might be repealed on September 30, in which case neither a breach nor resulting harm would exist.

Slightly less obvious, perhaps, but subject to precisely the same analysis, is the statutory regime created by the enactment of FIRREA on August 9, 1989. The complex background of FIRREA, its implementing regulations, and the breach-of-contract suits to which it gave rise is set out in this Court's *Winstar* decision. *See* 518 U.S. at 855-61. Basically, the FIRREA-related statutory/regulatory regime precluded various savings and loans and other thrift institutions from using certain accounting methods that they had been permitted, pursuant to contracts with the government, to use previously to their advantage. More specifically, they were prevented from continuing to use so-called "supervisory goodwill" to count toward regulatory capital to the same extent that they had previously been permitted to do so by the contracts in question. Moreover, FIRREA expanded the previously unitary notion of regulatory capital to include three new categories: "tangible" capital, "core" capital, and "risk-based" capital -- and it made clear that the extent to which supervisory goodwill could count as regulatory capital would vary from category to category, with the exact contours of those categories and the definition of "supervisory goodwill" to be honed by the regulations that the newly-created Office of Thrift Supervision ("OTS") was directed to promulgate. *Id.* at 856-57; *Ariadne*, 133 F.3d at 876-77.

Critically, however, section 401(h) of FIRREA provided that all regulations formerly in effect regarding regulatory capital continued in effect until replaced. *See*

FIRREA § 401(h) (attached hereto at App. 1). The Conference Report accompanying FIRREA in fact explicitly stated that until OTS promulgated new regulations, the "capital regulations promulgated by the Federal Home Loan Bank Board remain in effect." H.R. Conf. Rep. No. 101-222, at 406 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 445.

On November 8, 1989, the Federal Register published OTS' interim final regulations setting forth the regulatory capital standards and definitions required to implement FIRREA, including the definition of supervisory goodwill. Regulatory Capital, 54 Fed. Reg. 46,845, 46,869 (Nov. 8, 1989). In the regulations, OTS stated that the new capital requirements would become effective on December 7, 1989. OTS indicated that, at some point in the future, it would notify those institutions it believed would "fail one or more of the capital requirements *as of December 7, 1989*" and would direct such institutions to file capital plans or to take other actions. *Id.* at 46,865 (emphasis added). OTS also made clear that the first quarterly financial report in which thrifts would have to begin deducting supervisory goodwill from regulatory capital was the report for the fourth quarter of 1989, ending on December 31, 1989. Memorandum from OTS to Thrift Managing Officers at 1 (Dec. 1989) (attached hereto at App. 3); *see also* FIRREA Limitations Decision, 37 Fed. Cl. at 1893. There was no regulatory requirement that any deduction of supervisory goodwill be reflected in the September 30 third-quarter report; instead, thrifts were instructed to use the "same" approach to the third-quarter report that they had used in their second-quarter report. Memorandum from OTS to Thrift Managing Officers at 1 (Sept. 1989) (attached hereto at App. 6); *see also* FIRREA Limitations Decision, 37 Fed. Cl. at 183. The regulations did in fact become effective on December 7, 1989.

In its FIRREA Limitations Decision, the Court of Federal Claims held that the limitations period applicable to *amici's* breach-of-contract suits against the government did not begin to run with the August 9, 1989 enactment of FIRREA, but that it commenced only when the implementing regulations became effective on December 7, 1989.[6] 37 Fed. Cl. at 184, 191. The court noted that *amici's* claims were based on the government's alleged violation of its contractual duty to allow them (for varying periods of time) to recognize supervisory goodwill when calculating regulatory capital. Thus, the court concluded that under the theory asserted in the complaints, the government did not breach that obligation -- and *amici* were not harmed -- until (at the earliest) the regulations became effective, for until that time the statutory regime permitted them to continue to count supervisory goodwill toward their regulatory capital requirements:

> Unless the enactment of FIRREA entailed, in itself, some contractual nonperformance, it was merely an anticipatory repudiation and cannot serve as the trigger point for the statute of limitations.
>
> . . . FIRREA contained several provisions, not relevant to this litigation, that were apparently self-executing and did not require implementing regulations. Under th[e] paragraph setting forth the new capital standards, however, . . . promulgation of [the regulations] appears to have been the triggering act for any application of the new capital requirements. *See* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 406 (1989) ("Until the capital standards required in this Act become effective, the capital regulations promulgated by the Federal Home Loan Bank Board remain in effect.") . . .
>
> For the fiscal quarter ending September 30, 1989, OTS instructed thrifts to fill out the required Thrift Report form in the same manner as they had for the quarter ending June 30, 1989. . . . It was not until the December 1989 Thrift Report, after the OTS regulations had taken effect, that thrifts were instructed not to complete certain fields on the report due to "the new capital regulation."

Id. at 183.

The Court of Federal Claims then summarized its analysis and its conclusion as follows:

> Thus, from the standpoint of statutory construction, FIRREA conditioned the implementation of its new capital standards on regulations that did not take effect until four months after the statute's enactment. . . .
>
> . . . Even assuming that FIRREA set forth terms that clearly contradicted the forbearance agreements, if those terms were not implemented until later, the moment of enactment did not constitute an actual breach. Until the actual implementation, there occurred no invasion of a legal right.

[6] There is in fact language in the Court of Federal Claims' opinion suggesting that perhaps the limitations period did not commence until either December 31, 1989, the date of the first quarterly thrift financial report reflecting the deduction of goodwill, or January 9, 1990, when the OTS issued a "Thrift Bulletin" making clear that thrifts that had contracts with the government regarding supervisory goodwill would not be excepted from application of the new regulations concerning regulatory capital. *See* 37 Fed. Cl. at 184; OTS, *Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund*, Thrift Bulletin No. 38-2 (Jan. 9, 1990), *available at* 1990 WL 309397.

Id. at 183-84. Accordingly, the court held that the plaintiffs' complaints (including those of *amici*), which had been filed between August 9, 1995, and December 8, 1995, were timely.[7] This reasoning is entirely sound. In the context of FIRREA, in fact, the government itself, when it suited its purposes, had taken the same position thus adopted by the Court of Federal Claims. In two takings suits brought by *Winstar*-related plaintiffs after the enactment of FIRREA but before the effective date of its implementing regulations, the Government argued that:

> FIRREA's capital requirements have not even been effectuated . . . . [T]hose requirements do not take effect until the effective date of the Director's final regulations . . . [and therefore] plaintiffs' "property" cannot have been taken. . . .

Memorandum in Support of Defendants' Motion to Dismiss at 30, *Long Island Savings Bank, F.S.B. v. FSLIC*, No. CV-89-2699 (E.D.N.Y. Oct. 20, 1989) (attached hereto at App. 7); Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 31, *El Paso Savings Ass'n v. Director, OTS*, No. EP-89 CA 426 (W.D. Tex. Nov. 24, 1989) (attached hereto at App. 8).

---

[7] In a recent decision the Court of Federal Claims held that as to one thrift, the limitations period commenced on a date that fell between August 9 and December 7, 1989. *Bank of America, F.S.B. v. United States*, 51 Fed. Cl. 500 (2002). On October 6, 1989, federal thrift regulatory authorities took specific action against the thrift in question by imposing FIRREA-related conditions on a proposed acquisition. In that instance, therefore (the court held), a breach and resulting harm occurred before the regulations became effective on December 7, 1989. Conceptually, the governmental action focused on there by the court may be viewed as the equivalent of a refusal to accept a prepayment request from one of the Petitioners herein, except that it occurred before rather than after promulgation of the relevant regulations.

By contrast, ELIHPA's effectiveness was in no way conditioned upon or postponed until the promulgation of implementing regulations. As the Federal Circuit explicitly stated, "[t]he *statutory command of ELIHPA, not its regulations*, eliminated the allowance of prepayments." 240 F.3d at 1364 n.3 (emphasis added).[8] It was precisely for that reason, in fact, that the Federal Circuit disagreed in *dictum* with the Court of Federal Claims' view (also expressed in *dictum*) that the limitations period began to run from the effective date of the regulations. *Id.* (citing *Alder Terrace v. United States*, 161 F.3d 1372, 1378 (Fed. Cir. 1988)).

Accordingly, should the Court affirm the result below, and should it wish for whatever reason to discuss the date-of-enactment versus date-of-regulations issue (an issue which, as we have noted, is not really presented), we respectfully ask that its opinion address the ELIHPA statutory scheme only, and that it not suggest in any way whether or to what extent it might extend to very different statutory regimes, such as FIRREA's.[9] Those questions, we

---

[8] To be sure, ELIHPA provided that implementing regulations would be issued, *see* 42 U.S.C. § 1472(c)(5)(J) (2001), just as many if not most federal statutes so provide or contemplate. But unlike FIRREA, as outlined above, ELIHPA in no way conditioned or postponed application of any relevant provision until the effective date of such regulations. Nor is there any ELIHPA legislative history, comparable to the conference report accompanying FIRREA, indicating otherwise.

[9] Such an approach is in fact called for by the Court's careful framing of the contract-related question specified in its grant of *certiorari* (which differed from the parties' framing of that question):

> Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts *a statute alleged to abridge a contractual right* to freedom from regulatory covenants upon *prepayment of government mortgage loans*.

submit, should properly be decided in cases that actually present them. The question of the triggering event for the limitations period in the context of FIRREA, for example, presumably will be addressed in due course by the Court of Appeals for the Federal Circuit when awards of damages -- which already have been made in some of the *Winstar*-related cases -- come before the Federal Circuit in cases that have been held to be timely in the FIRREA Limitations Decision.

CONCLUSION

Amici believe that the decision of the Federal Circuit should be reversed. Should the Court affirm that decision, however, *amici* submit that it should leave unaddressed the question of whether the applicable limitations period began to run on the date of ELIHPA's enactment or on the effective date of its implementing regulations, inasmuch as that issue is irrelevant to the outcome of the case.

Moreover, to the extent that the Court may affirm the decision below and may choose in *dictum* to discuss that issue, we respectfully ask that care be taken to restrict its analysis to ELIHPA. Under some statutory regimes, conceivably including ELIHPA (though we strongly disagree with such a characterization of ELIHPA), it may be that enactment of the statute in question triggers the Tucker Act's six-year statute of limitations. Under other regimes, however, such as the one created by FIRREA -- where application of a statutory provision is conditioned on the

---

Franconia Assocs. v. United States, No. 01-455, 2002 WL 10619 (U.S. Jan. 4, 2002) (emphasis added). *Amici's* claim is not that "a statute [*i.e.*, FIRREA] abridged [their] contract[s]," but rather that later action based on FIRREA's regulations did so. Nor, of course, do *amici's* cases involve "prepayment of government mortgage loans."

promulgation of implementing regulations -- the statutory enactment alone clearly would not start the limitations clock running. At a bare minimum, the Court should avoid appearing implicitly to address or to resolve the limitations issue with respect to such other statutory regimes.

Dated: February 19, 2002 Respectfully submitted,

Steven S. Rosenthal
Counsel of Record
Alan K. Palmer
Leo G. Rydzewski
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 955-3000
Counsel for Bank of America, FSB

John C. Millian
GIBSON, DUNN
& CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
Counsel for Gerald R. Parsky

Melvin C. Garbow
Howard N. Cayne
David B. Bergman
Michael A. Johnson
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
Counsel for Beverly W. Thrall (Successor By Operation of Law to the Claims of Larry B. Thrall)

Stephen M. Forte
SMITH, GAMBRELL & RUSSELL, LLP
1230 Peachtree Street,
Suite 3100
Atlanta, Georgia 30309-3592
Counsel for SouthTrust of Georgia, Inc. and SouthTrust Bank of Georgia, N.A.

Daniel J. Goldberg, Esq.
KUTAK ROCK LLP
1101 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
Counsel for LSB Industries and Prime Financial Corp.; James M. Weichert; Morton Federal Savings Bank; Heartland Savings Bank, FSB and Love Savings Holding Co.; First Federal Bank and Southeastern Financial, Inc.; Hometown Savings and Loan; and Clare Bank, N.A. and E. Robert Clare.

William T. Reilly
McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Counsel for Statewide Savings Bank, S.L.A

Michael C. Leuder
777 E. Wisconsin Ave.
Milwaukee, WI 53202
Counsel for Mercantile Bank of St. Louis, N.A.

APPENDIX

Table of Contents
For Appendix

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 357 § 401(h) ..... App. 1

Memorandum from OTS to Thrift Managing Officers (Dec. 1989) ..... App. 2

Memorandum from OTS to Thrift Managing Officers (Sept. 1989) ..... App. 5

Memorandum In Support of Defendants' Motion to Dismiss, *Long Island Savings Bank, F.S.B. v. FSLIC*, CV-89-2699 (E.D.N.Y. Oct. 20, 1989) ..... App. 7

Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *El Paso Savings Ass'n v. Director, OTS*, No. EP-89 CA 426 (W.D. Tex. Nov. 24, 1989) ..... App. 8

[Excerpt from Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 357 § 401(h)]

* * *

(h) CONTINUATION OF ORDERS, RESOLUTIONS, DETERMINATIONS, AND REGULATIONS. -Subject to section 402, all orders, resolutions, determinations, and regulations, which –

(1) have been issued, made, prescribed, or allowed to become effective by the Federal Savings and Loan Insurance corporation or the Federal Home Loan Bank Board (including orders, resolutions, determinations, and regulations which relate to the conduct of conservatorships and receiverships), or by a court of competent jurisdiction, in the performance of functions which are transferred by this Act; and

(2) are in effect on the date this Act takes effect,

shall continue in effect according to the terms of such orders, resolutions, determinations, and regulations and shall be enforceable by or against the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, or the Resolution Trust Corporation, as the case may be, until modified, terminated, set aside, or superseded in accordance with applicable law by the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, or the Resolution Trust Corporation, as the case may be, by any court of competent jurisdiction, or by operation of law.

* * *

[Excerpt from Memorandum from OTS to Thrift Managing Officers (Dec. 1989)]

[SEAL]

Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W.,
Washington, D.C. 20552

December 1989

TO: THE MANAGING OFFICER OF THE INSTITUTION ADDRESSED
THE INSTITUTION'S THRIFT FINANCIAL REPORT PREPARER

SUBJECT: DECEMBER 1989
THRIFT FINANCIAL REPORT

Enclosed, along with a supply of labels, are four sets of the December 1989 form to be used for completing this Thrift report. Date of requested data and filing date are as follows:

Report Month	Data Date	Filing Date
December 1989	12/31/89*	1/20/90

*Requested data to be provided regardless of your institution's fiscal year-end.

If your District Office of OTS has a requirement for the electronic transmission filing of the Thrift reports, your institution should disregard the following paragraph on the filing of the enclosed copy sets. This report must be filed, however.

Please submit your original and first copy sets of the completed December 1989 Thrift form to your District Office of OTS. The second copy set is to be kept for your institution's own use, and the last copy set may be used for requests made by state savings and loan departments. No copy set should be submitted to the Office of Thrift Supervision in Washington, D.C. Reproductions may be used but only if they are permanent and completely legible.

The December 1989 Thrift Report form is the same as the September 1989 Thrift Report form except that the December form always includes page A-1, Section I, Annual Supplement. The December 1989 Section I is the same as the December 1988 Section I. PLEASE NOTE: Because of the new capital regulation, only certain fields on the enclosed Section K, pages Q-9 and Q-10, need to be completed. Please see Attachment Section K immediately behind this letter for full details.

There are no new pages for the instruction book with this package.

A correct first submission eliminates the effort required for corrections. Please refer to the Instruction Book for information to help you properly complete the form. If you still have any questions regarding the completion of this report, please promptly contact the ICR Coordinator at your District Office of OTS for assistance.

Your cooperation and assistance in the prompt and accurate filing of this Thrift Financial Report are greatly appreciated by the Office of Thrift Supervision.

Sincerely,

George W. Hubler
System Industry Condition
Report Coordinator

Attachment

Enclosures

* * *

[Excerpt from Memorandum from OTS to Thrift Managing Officers (Sept. 1989)]

[SEAL]

Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W.,
Washington, D.C. 20552

September 1989

TO: THE MANAGING OFFICER OF THE INSTITUTION ADDRESSED
THE INSTITUTION'S THRIFT FINANCIAL REPORT PREPARER

SUBJECT: SEPTEMBER 1989
THRIFT FINANCIAL REPORT

Enclosed, along with a supply of labels, are four sets of the September 1989 form to be used for completing this Thrift report. Date of requested data and filing date are as follows:

Report Month	Data Date	Filing Date
September 1989	9/30/89*	10/20/89

*Requested data to be provided regardless of your institution's fiscal year-end.

If your District Office of OTS has a requirement for the electronic transmission filing of the Thrift reports, your

institution should disregard the following paragraph on the filing of the enclosed copy sets. This report must be filed, however.

Please submit your original and first copy sets of the completed September 1989 Thrift form to your District Office of OTS. The second copy set is to be kept for your institution's own use, and the last copy set may be used for requests made by state savings and loan departments. No copy set should be submitted to the Office of Thrift Supervision in Washington, D.C. Reproductions may be used but only if they are permanent and completely legible.

The September 1989 Thrift Report form is the same as the June 1989 Thrift Report form.

There are no new pages for the instruction book with this package.

* * *

[Excerpt from the Memorandum In Support of Defendants' Motion to Dismiss,
Long Island Savings Bank, F.S.B. v. FSLIC, CV-89-2699
(E.D.N.Y. Oct. 20, 1989) at 30]

* * *

In the instant case, plaintiffs claim that the application of FIRREA's regulatory restrictions on the use of goodwill to meet capital requirements has "taken" their property without just compensation. However, FIRREA's capital requirements have not even been effectuated. As discussed, supra, those requirements do not take effect until the effective date of the Director's final regulations and those regulations have not even been promulgated at this time. Thus, at this time, plaintiffs' "property" cannot have been taken and the question of whether the application of FIRREA to plaintiffs' capital computations constitutes a taking is not ripe for adjudication.

* * *

[Excerpt from Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 31, *El Paso Savings Ass'n v. Director, OTS*, No. EP-89 CA 426 (W.D. Tex. Nov. 24, 1989) at 31]

* * *

In the instant case, plaintiff claims that the application of FIRREA's regulatory restrictions on the use of goodwill to meet capital requirements has "taken" its property without just compensation. However, FIRREA's capital requirements have not even been effectuated. As discussed, supra, those requirements do not take effect until the effective date of the Director's regulations, December 7, 1989. Thus, at this time, plaintiff's "property" cannot have been taken and the question of whether the application of FIRREA to plaintiff's capital computations constitutes a taking is not ripe for adjudication.

* * *